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No. 01-1831

IN THE

Supreme Court of the United States

DOREL JUVENILE GROUP, INC.,

Petitioner,

v.

LOUIS M. KOHUS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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CLARIFICATION OF PETITIONER'S STATEMENT OF THE CASE

Petitioner Dorel Juvenile Group, Inc. (formerly "Cosco, Inc." in the lower courts and hereinafter referred to as "Cosco") cloaks its dissatisfaction with an adverse appellate decision — in a costs dispute involving a total of $12,950 — by manufacturing an issue for this Court's review. This Court has already held that the costs permissible to be taxed by a prevailing party are those specifically enumerated in 28 U.S.C. § 1920 and has directed that the lower courts interpret and apply those categories in accordance with the explicit statutory language. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

Reaching for an issue with which to capture this Court's attention, Cosco asserts that this Court ought to provide a comprehensive definition of the term "fees for exemplification" for imposition upon the various federal circuits. Cosco obscures the fact, however, that it never sought to tax its animated video — and the District Court did not award costs for the video — as a "fee[] for exemplification."

Further, Cosco ignores the fact that both it and its expert witness (who presented the animation as part of his expert report) characterized the animation as a "video model" of the allegedly infringing device — even though the federal circuits have consistently held that the cost of models is not taxable under 28 U.S.C. § 1920 (or is not taxable without pretrial authorization). Additionally, the animated video was prepared and presented solely as an exhibit to its expert's report. Once again, both this Court and the circuit courts have held that a prevailing party may not tax the costs of an expert's report or time except to the extent expressly permitted by statute. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

Faced with a record supporting the appellate court's denial of costs on a multitude of bases, Cosco is left to coax a single issue into the appearance of a critical point and to persuade this Court to ignore the overwhelming number of other bases on which the appellate court's decision is justified. Moreover, even the basis offered by Cosco is without merit. The so-called schism identified by Cosco applies to a narrow issue considered by a single Eleventh Circuit case and a single Seventh Circuit case. All of the other cases referenced by Cosco in its brief were decided before this Court's decisions in *Crawford Fitting*, and still adhered to the now-discredited belief that a district court, in exercise of its general equitable powers, could award costs beyond those specifically enumerated by statute. Accordingly, the allegedly broad "split among the circuits" asserted by Cosco simply does not exist.

Further, the disagreement between the cited Eleventh and Seventh circuit cases is *not* whether demonstrative evidence can be taxed at all, but simply how comparable that evidence must be to the enumerated categories in section 1920 to be taxed. This rather narrow issue has not been addressed by the other circuit courts in the fifteen years since *Crawford Fitting*, thus demonstrating the less-than-critical importance of the issue to litigants and the lower courts.

In short, there is no issue of general import for this Court's consideration, no "split among the circuits" for this Court's resolution and no reversible error for this Court's correction. Respondent Louis M. Kohus respectfully submits that the petition should be denied.

A. The record establishes that the animated video model was not taxable under any circumstances.

1. The animated video was prepared by Cosco's expert as part of that expert's report as a video "model" of the accused device.

Respondent Kohus sued Cosco, Inc., Toys R Us, Inc. and R&R Resale, Inc. ("Defendants") for infringement of United States Patent No. 4,688,280 ("the '280 Patent") for making, importing, and selling certain lines of children's playpens ("playyards"). *See* JA at A49 and A106-A107.

Pursuant to the District Court's Calendar Order, the parties served their expert reports on February 9, 1999. *See* JA at A21, A184, A241, A387, A404. On February 10, 1999, Defendants filed the report of their engineering expert, Dr. Alan McDonald. See JA at A404. Dr. McDonald's report consisted of a twenty-two page report with three exhibits prepared by the expert, including an animated "video model" depicting the folding and unfolding of the accused playyard. *See* JA at A406, A428A.

On May 4, 1999, Defendants moved for summary judgment of non-infringement. *See* JA at A430-A504. In support of their motion, Defendants attached the expert report of Dr. McDonald and the animated video model that was submitted as part of that report. *See* JA at A430-A433, A514-A540.

On June 22, 1999, Kohus opposed the motion for summary judgment. *See* JA at A661, A668-A674. In addition to noting numerous inaccuracies in the video model, Kohus provided the District Court with, among other things,

drawings of the patented and accused playyards and actual samples of the $79 playyards at issue. *See* JA at A792-A801, A673, A673 n.3, A701 and A701 n.16.

2. The animated video model was never relied upon or referred to by the District Court, was never presented for taxation as an "exemplification" by Defendants on their bill of costs, and was not awarded as "exemplification fees" by the District Court.

On August 17, 1999, the District Court adopted a narrow interpretation of the '280 Patent's claim language and, based on the parties' uncontested descriptions of the accused device, granted summary judgment in favor of Defendants. *See* JA at A3314 and A3314 n.1. In its opinion, the District Court never once cited to or relied on the animated video model, the sample playyards offered by Kohus for the District Court's consideration or any other evidence presented for the Court's review. *See* JA at A3303-A3315. On September 14, 1999, Kohus appealed the District Court's grant of summary judgment and, on June 15, 2000, the Federal Circuit affirmed. *See* JA at A3329.

On June 29, 2000, Defendants presented a bill of costs. Specifically, Defendants submitted various costs for taxation as "fees for exemplification and copies of paper" and *separately* requested the taxation of their expert's animated video model and exhibits as "other costs." *See* JA at A3384. On February 7, 2001, the District Court Clerk of Courts denied Defendants' request for taxation of the animated video model, noting that Defendants had not shown that any of the "exhibit" costs (including the animated video model) or the requested exemplification charges were necessary for the preparation of this case. JA at A3382-A3383.

On April 12, 2001, the District Court affirmed the Clerk's denial of Defendants' requested exemplification charges. JA at A4-A5. The District Court, however, then reversed the Clerk's denial of costs for the $12,950 video model prepared by Defendants' expert, even though the District Court had never considered the video model in resolving this case and even though samples of the playyards at issue had been offered for the District Court's consideration. *See* JA at A5. The District Court cited no precedent or authority for the award of costs. *See id.*

On May 10, 2001, Kohus appealed the District Court's award of costs for the video model. Defendants did not appeal the District Court's denial of those costs which Defendants had designated on their bill of costs as "exemplification charges."

B. The Federal Circuit noted that the animated video model was not taxable because (1) there is no basis for construing "fees for exemplification" so broadly as to include the computer-animated video models and (2) even if demonstrative evidence can be broadly taxed as costs, models are not sufficiently analogous to the categories of taxable costs.

On appeal, Kohus argued that the district court abused its discretion in awarding costs for the animated video model. Relying on *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), the Federal Circuit noted that the District Court could not award costs beyond those specified by section 1920 and concluded that there was no statutory basis for the taxation of the animated video model:

> In accordance with *Crawford Fitting*, the district court in this case was limited to awarding those

> costs specified by 28 U.S.C. § 1920. The only provision of section 1920 that could arguably apply to defendants' video exhibit is subsection (4) regarding "exemplification and copies of papers." A video obviously is not a copy of paper. Nor is it an exemplification when that term is given its legal definition of "[a]n official transcript of a public record, authenticated as a true copy for use as evidence." Black's Law Dictionary 593 (7th ed. 1999). We reject defendants' contention that "exemplification" should be construed broadly to encompass the video exhibit in this case. No Sixth Circuit precedent supports such an expansive interpretation of the term. In addition, Congress did not use the broad phrase "demonstrative evidence" in section 1920, and we are clearly bound not to exceed the limits of this statute. *See Crawford Fitting*, 482 U.S. at 445. Thus, because the video exhibit in this case is not an exemplification, the district court had no statutory authority to award costs for the video. The district court erred by taxing the cost of the video to Kohus.

Pet. at 9a-10a.

Continuing, the Federal Circuit noted that the Sixth Circuit had not yet ruled on the issue of whether a video model or computer animation could be taxed as costs. Pet. at 10a. Nonetheless, the Federal Circuit noted that, even if demonstrative evidence could be broadly taxed as "exemplifications," the animated videotape was not taxable because it was — by Defendants' own admission — a video "model" of the accused device and, under Sixth Circuit law,

models are not taxable as costs. *See* Pet. at 10a-13a (citing *Swan Carburetor Co. v. Chrysler Corp.*, 149 F.2d 476 (6th Cir. 1945)). Specifically, the Sixth Circuit has long held that physical models are often used in patent cases as an aid to the explanations of expert witnesses or the argument of counsel, but that such models are not analogous to the categories of costs allowed by statute and, thus, ought not be taxed to the losing party. *See* Pet. at 10a-13a (citing *Swan Carburetor*, 149 F.2d at 478). Noting that the video model in this matter was comparable to the physical model at issue in *Swan Carburetor*, the Federal Circuit observed that the video model was not taxable for this additional reason. *See* Pet. at 11a-13a.

Further, the dissenting opinion by Judge Dyk *agreed* with the majority that the animated video model was not taxable under *Crawford Fitting* or 28 U.S.C. § 1920. *See* Pet. at 14a-15a. Nevertheless, Judge Dyk dissented because he believed the Sixth Circuit's *Swan Carburetor* decision would have allowed the taxation of the video model. *See* Pet. at 14a-16a.

REASONS FOR DENYING THE PETITION

Cosco's petition should be denied because the Federal Circuit's decision comports with *Crawford Fitting* and 28 U.S.C. § 1920 and is supportable on any of numerous alternative bases. Additionally, this case implicates no split among the circuits for this Court's resolution.

A. The Federal Circuit 's decision comports with *Crawford Fitting* and 28 U.S.C. § 1920 and is not a proper case for this Court's review because any decision by this Court addressing the issue presented by Cosco will be dicta in light of the numerous, alternative bases for affirmance.

1. The Federal Circuit's decision is in accord with *Crawford Fitting* and 28 U.S.C. § 1920.

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987), this Court held that, absent explicit statutory or contractual authorization, federal courts are bound by the limitations set out in 28 U.S.C. § 1920 and possess no discretion to award other categories of costs. *See id.* "Title 28 U.S.C. § 1920 now embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party," *see id.* at 440, and, "absent explicit statutory or contractual authorization for the taxation of the expenses . . . federal courts are bound by the limitations set out in 28 U.S.C. § 1821 [regarding witness fees] and § 1920." 482 U.S. at 445.

In *Crawford Fitting*, this Court addressed the particular issue of whether a district court could award expert witness fees under 28 U.S.C. § 1920(3) in excess of those specified

by 28 U.S.C. § 1821(b). The Court concluded that while Rule 54(d) and section 1920(3) gave the district court discretion to award expert witness fees, section 1821 limited the amount that could be awarded. *Id.* at 441. "[W]hen Congress meant to set a limit on fees, it knew how to do so. . . . The discretion granted by Rule 54(d) is not a power to evade this specific congressional command. Rather, it is solely a power to decline to tax, as costs, the items enumerated in § 1920." *Id.* at 442. Noting that the district judge does not have discretion to award costs not specifically authorized by statute, the Court found that the trial judge did not have the discretion to award expert witness fees, such as the expert's hourly rate, beyond those specified by section 1821. *Id.* at 445.

In the present case, the Federal Circuit examined the language of 28 U.S.C. § 1920 and this Court's *Crawford Fitting* decision and concluded that the District Court did not have authority to award costs for the animated video model. *See* Pet. at 8a-10a. The Federal Circuit noted that no provision of 28 U.S.C. § 1920 expressly provided for the taxation of such animated videos or demonstrative evidence, nor had Cosco pointed to any provision authorizing the taxation. *Id.* Indeed, the Federal Circuit noted that Cosco had presented certain copying costs on its bill of costs for taxation as "exemplification charges" and *separately* presented its animated video as miscellaneous "other" costs. *See id.* at 11a and 11a n.8.

Nonetheless, the Federal Circuit considered Cosco's belated suggestion that its video model was taxable under section 1920(4) regarding "exemplification and copies of papers." *Id.* at 11a. The Federal Circuit noted that a "video obviously is not a copy of paper . . . [n]or is it an exemplification when that term is given its legal definition

of '[a]n official transcript of a public record, authenticated as a true copy for use as evidence.'" *See id.* at 9a-10a (quoting Black's Law Dictionary 593 (7th ed. 1999)). Both the majority and dissenting opinions concurred on this point. *See* Pet. at 9a-10a and 14a (Dyk, J., dissenting) ("This case, however, does not involve copying or authentication costs, but the costs of preparing the original video. Those costs do not, I think, fall within the statute.").

Further, the Federal Circuit concluded that section 1920 could not be read so broadly as to include every permutation of demonstrative evidence, including the computer-animated video model. Citing *Crawford Fitting*, the Federal Circuit noted that Congress could have provided in section 1920 for the taxation of "demonstrative evidence" generally, but had chosen not to do so. *See* Pet. at 10a ("Congress did not use the broad phrase 'demonstrative evidence' in section 1920, and we are clearly bound not to exceed the limits of this statute.") (citing *Crawford Fitting*, 482 U.S. at 445). In accordance with *Crawford Fitting*, the Federal Circuit thus concluded that the district court lacked discretion to broaden the scope of recoverable costs and reversed the District Court's decision. *See* Pet. at 9a-10a.

Lastly, the Federal Circuit noted yet an additional basis for its decision. Even if the costs of preparing demonstrative evidence could be broadly awarded as "fees for exemplification" in accordance with *Crawford Fitting*, the Federal Circuit noted that the Sixth Circuit (the circuit whose law was applicable to this appeal) had expressly disapproved the taxation of models — such as the Defendants' video model — in patent cases since 1945. *See* Pet. at 10a-12a.

Contrary to Cosco's assertions (*see* Pet. at 13-14), the Federal Circuit did *not* define "exemplification" fees on the one hand and then go "beyond the scope of its definition" on the other. *See* Pet. at 14. In fact, the Federal Circuit first held that "fees for exemplification" did not include the animated video model in this case and noted that Congress had declined to use the broad phrase "demonstrative evidence" in identifying categories of recoverable costs. *See* Pet. at 10a-12a (citing *Swan Carburetor*, 149 F.2d at 477-78). The majority then noted that, *even if* demonstrative evidence were broadly taxable as "exemplification[s]," the Sixth Circuit's opinion in the 1945 case of *Swan Carburetor* made it clear that the Sixth Circuit did not consider model costs sufficiently analogous to the statutory language awarding fees for "exemplifications." *See id.* at 11a ("*[T]o the extent Swan is precedential authority*, it provides an additional basis for reversing the district court's award because the video exhibit is no different than the [non-taxable] physical models at issue in *Swan*.") (emphasis added).[1]

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1. The dissenting opinion by Judge Dyk rests on a fundamental error. The majority opinion concludes (correctly and consistently) that the animated video model is taxable *neither* under 28 U.S.C. § 1920 and *Crawford Fitting*, *nor* under the Sixth Circuit's decision in *Swan Carburetor*. *See* Pet. at 14a (Dyk, J., dissenting).

Judge Dyk, however, concludes that the video model is not taxable under 28 U.S.C. § 1920 or *Crawford Fitting*, but then asserts that the video model is somehow rendered taxable by the Sixth Circuit's 1945 decision in *Swan Carburetor*. *See* Pet. at 15a-16 (Dyk, J., dissenting). Obviously, if the animated video model is not taxable under 28 U.S.C. § 1920 (the only statutory basis for its taxation), the Sixth Circuit's decision in *Swan Carburetor* cannot broaden the scope of recoverable costs to include the animated video

(Cont'd)

The Federal Circuit followed this Court's analysis in *Crawford Fitting*, examined the statutory language and properly concluded that the District Court lacked authority to tax the costs of the animated video model to Kohus. As the Federal Circuit concluded, and this Court directed in *Crawford Fitting*, it is the province of Congress — and not the courts — to establish the scope of costs which may be taxed against a losing party. Where Congress has declined to make certain costs taxable, those limitations must be respected and adhered to by the district courts.

2. This case is not suitable for this Court's review because the appellate court decision must be affirmed on any of numerous, alternative bases and, thus, any decision by this Court on the issue framed by Cosco will be dicta.

The present case is not suitable for this Court's review because of the numerous alternative bases upon which the Federal Circuit's decision must be affirmed. Even if this Court accepted the case for review on the broad issues framed by Cosco — (1) "[w]hat costs are recoverable as '[f]ees for exemplification and copies of paper'" and (2) whether the Federal Circuit erred in construing 28 U.S.C. § 1920(4) to exclude computer-animated models — any decision by this Court would be dicta because the Federal Circuit's opinion must be affirmed on any of numerous, alternative bases.

(Cont'd)

model. *See Crawford Fitting*, 482 U.S. at 445 ("[A]bsent explicit statutory or contractual authorization for the taxation of the expenses . . . federal courts are bound by the limitations set out in 28 U.S.C. § 1821 [regarding witness fees] and § 1920.").

First, the petition should be denied because any decision regarding the meaning of exemplification fees is dicta in this matter; specifically, the Defendants never presented their video model for taxation as an "exemplification" fee on their bill of costs. *See* JA at A3384. Rather, as the Federal Circuit correctly noted, Defendants presented a request for taxation of certain costs as "exemplification" charges and *separately* requested taxation of the video model as "other costs." *See id.* Further, the District Court itself did not award costs for the animated video model as an "exemplification." *See* JA at A5.

Second, the petition should be denied because the Federal Circuit's decision must be affirmed on the alternative ground that the animated video model was prepared and submitted as part of Defendants' expert report. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987), this Court held that, absent explicit statutory or contractual authorization, federal courts may not award expert fees beyond the daily attendance fee and allowable travel and subsistence expenses specified in 28 U.S.C. § 1821(b). Because a district court may not tax the costs of preparing a party's expert report, or the exhibits to that report, the District Court lacked authority to tax the costs of the Defendants' animated video and the Federal Circuit correctly reversed the award of costs. *See id.*

Third, the petition should be denied because the Federal Circuit's decision must also be affirmed on the basis that the animated video model in this case was not necessarily obtained for use in the case. As Kohus noted for the Federal Circuit, the District Court's award of $12,950 in costs for an animated video depicting the folding and unfolding of the $79 accused playyard — *164 times the cost of the actual*

playyard which was also offered for the Court's consideration — was an abuse of discretion. *See, e.g.*, Pet. at 8a n.5 (questioning whether Defendants could demonstrate necessity in the present case); *see also Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1101 (5th Cir. 1982) ("[E]xpenses incurred extravagantly or unnecessarily should be disallowed. . . ."), *overruled on other grounds, International Woodworkers of America, AFL-CIO and its Local No. 5-376 v. Champion Intern. Corp.*, 790 F.2d 1174 (5th Cir. 1986). Cosco's questions presented assume — improperly — that a showing of necessity for the video model can be made.

Fourth, the petition should be denied because the position urged by Cosco for this Court's adoption has no application to the present case. Specifically, Cosco asserts in its petition that section 1920 "should be construed to allow recovery for trial exhibits, in whatever form, if such exhibits are necessarily obtained for use at trial." *See* Pet. at 17. Cosco omits to mention that the animated video model *was never prepared for, or used at, trial*; rather, the animated video model was prepared solely as an exhibit to Cosco's expert report, was never introduced into evidence and was never cited to or relied upon by the District Court. *See* JA at A404, A428A, and A5. In short, the position urged by Cosco has no bearing on the present case or the circumstances in which the video model was created. Accordingly, this Court's decision on Cosco's questions presented will have no application to the present case.

Because any decision that this Court might render as to the issues presented would be irrelevant to this case's ultimate disposition, Kohus respectfully submits that this matter is not appropriate for this Court's review.

B. This case does not implicate any split among the circuits for this Court's resolution.

Contrary to Cosco's assertions, this case implicates no broad split among the circuits. Because there is no split for this Court's resolution, the present case is inappropriate for resolution by this Court.

As an initial matter, the ***only*** case (other than the present one) which deals with the taxability of computer animation is the Eleventh Circuit's decision in *Arcadian Fertilizer, L.P. v. MPW Indus. Services, Inc.*, 249 F.3d 1293, 1297 (11th Cir. 2001). In *Arcadian Fertilizer*, the Eleventh Circuit held — *just as the Federal Circuit did in this case* — that computer animation is not taxable under 28 U.S.C. § 1920(4) as a "fee for exemplification or copies of paper." *See id.* at 1296-97.

Similarly, Cosco identifies *no* other cases (let alone a split in authority) as to whether an animated video — that was prepared solely as an exhibit to an expert report; that was never used at trial; that was never admitted into evidence; and that was never cited to or relied upon by the district court — can be taxed as fee for exemplification. *See* Pet. at 7-13.

Further, Cosco cites no split among the circuit courts as to the taxation of costs for models. Specifically, the only decisions cited by Cosco that deal with the taxation of models uniformly hold that such models *are not taxable* without some prior order or approval of the district court. *See Swan Carburetor Co. v. Chrysler Corp.*, 149 F.2d 476, 478 (6th Cir. 1945) (physical models used in explaining a party's patent infringement position were not taxable as costs); *Reinharts, Inc. v. Caterpillar Tractor Co.*, 99 F.2d 648, 649-50 (9th Cir. 1938) (models are not taxable); *Johns-Manville*

Corp. v. Cement Asbestos Prods. Co., 428 F.2d 1381, 1385 (5th Cir. 1970) (models are not taxable without prior order of the district court).

Additionally, Cosco fails to present a split among the circuits after *Crawford Fitting* as to the scope of recoverable costs under section 1920(4). Specifically, the Second, Fifth, Ninth, and Tenth circuit decisions cited by Cosco in its petition were either *decided prior to this Court's 1987 decision in Crawford Fitting* — or fail to address the impact of *Crawford Fitting* — and, thus, rely on the now-discredited assumption that a district court possesses inherent authority to award costs in addition to those specifically enumerated by statute. *See In re Air Crash Disaster at John F Kennedy Int'l Airport*, 687 F.2d 626, 631 (2d Cir. 1982); *Appliance Investment Co. v. Western Electric Co.*, 61 F.2d 752 (2d Cir. 1932); *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 132-33 (5th Cir. 1983); *Johns-Manville Corp. v. Cement Asbestos Prods. Co.*, 428 F.2d 1381, 1385 (5th Cir. 1970); *Reinharts, Inc. v. Caterpillar Tractor Co.*, 99 F.2d 648, 649-50 (9th Cir. 1938); *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767, 770 (9th Cir. 1988) (although decided after *Crawford Fitting*, the Ninth Circuit paradoxically relies on decisions decided *before Crawford Fitting* to define the scope of taxable costs); *Mikel v. Kerr*, 499 F.2d 1178, 1182-83 (10th Cir. 1974); *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1476 (10th Cir. 1997) (decided after *Crawford Fitting*, but makes no mention of *Crawford Fitting*); *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1248 (10th Cir. 1998) (decided after *Crawford Fitting*, but makes no mention of *Crawford Fitting*).

Similarly, many of the decisions cited by Cosco have nothing whatsoever to do with section 1920(4), the taxation

of video models or the general taxation of demonstrative evidence. *See Denny v. Westfield State Col.*, 880 F.2d 1465, 1472 (1st Cir. 1989) (cited at page 9 of Cosco's petition for the unremarkable proposition that there is a distinction between the preparation of trial exhibits and general intellectual preparation for trial); *Romero v. City of Pomona*, 883 F.2d 1418, 1427-28 (9th Cir. 1989) (addressing the taxability of expert witness fees), *abrogation recognized by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990).

Lastly, the only post-*Crawford Fitting* conflict which Cosco can identify is the disagreement between the Eleventh Circuit and the Seventh Circuit as to how broadly the term "exemplification" can be interpreted. *See* Pet. at 7-8 (citing *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000)) and Pet. at 11-12 (citing *Arcadian Fertilizer, L.P. v. MPW Indus. Services, Inc.*, 249 F.3d 1293, 1297 (11th Cir. 2001)). Importantly, the issue considered by these courts is *not* — as framed by Cosco (*see, e.g.*, Pet. at 17-18) — whether demonstrative evidence can ever be taxed under section 1920(4). Rather, the issue considered by the Eleventh and Seventh Circuits is, simply, how comparable the demonstrative evidence must be to the specifically enumerated categories under section 1920 to be taxed. *See, e.g., Arcadian Fertilizer, L.P. v. MPW Indus. Services, Inc.*, 249 F.3d 1293, 1297 (11th Cir. 2001) (denying costs for computer animation because computer animation was not analogous to the "exemplifications and copies of paper" noted in section 1920(4), *but approving award of costs for other demonstrative evidence* — such as oversized documents and photographs — which were capable of such a characterization). Tellingly, Cosco can identify only these two circuit decisions in the fifteen years since *Crawford Fitting* which have had occasion to address this issue.

Indeed, Cosco strains even to tie this narrow disagreement to the present case. Specifically, because the Federal Circuit provided two different bases for its decision, the resolution of the alleged split identified by Cosco has little or no impact upon the present case. Specifically, the Federal Circuit held that the District Court's award of costs for the animated video model must be reversed because (1) a video model is not taxable as an exemplification because the word "exemplification" cannot be read so broadly as to include all forms of demonstrative evidence and (2) even if demonstrative evidence ought to be broadly taxed as "exemplification[s]," models — such as the video model in the present case — are still not sufficiently analogous to the enumerated categories of awardable costs. *See* Pet. at 10a-13a.

Thus, even if this Court decides that the word "exemplification" in section 1920(4) can be read broadly to include varieties of demonstrative evidence, all of the cases cited by Cosco demonstrate that models — due to their cost and their primary purpose as an aid to the arguments of counsel and expert witnesses — ought nonetheless be *excluded* from recoverable costs. *See, e.g.*, *Swan Carburetor Co. v. Chrysler Corp.*, 149 F.2d 476, 478 (6th Cir. 1945) (physical models used in explaining a party's patent infringement position were not taxable as costs because such costly models are primarily an aid to the arguments of counsel or the explanations of expert witnesses); *Reinharts, Inc. v. Caterpillar Tractor Co.*, 99 F.2d 648, 649-50 (9th Cir. 1938) (models are not taxable as costs); *Johns-Manville Corp. v. Cement Asbestos Prods. Co.*, 428 F.2d 1381, 1385 (5th Cir. 1970) (models are not taxable as costs without prior order of the district court).

Further, Kohus respectfully submits that the issue presented by Cosco — the scope of the word "exemplification" as used in section 1920(4) — is not appropriate for this Court's review because none of the other circuit courts have had the opportunity to address the issue since *Crawford Fitting*. Unless this Court wishes to provide a comprehensive definition of each and every permutation of "fees for exemplification and copies of paper" for use by all federal courts — without the benefit of the other circuits' reflection on and consideration of the issue — Kohus submits that the issue is overly broad and premature for this Court's consideration.

In short, Cosco has identified no split among the circuit courts that is relevant to the issues in the present case, that would mandate a reversal of the present case or that merits this Court's resolution. Kohus respectfully submits that the petition should be denied.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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